IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
ASSIGNED ON BRIEFS MAY 29, 2007

GREG MABEY d/b/a LIBERTY REALTY & AUCTION v. NICK MAGGAS, ET UX.

Direct Appeal from the Circuit Court for Putnam County
No. 05J-0031 John Turnbull, Judge

No. M2006-02689-COA-R3-CV - Filed September 18, 2007

This appeal involves a dispute arising out of a real estate listing contract. The contract originally provided that the real estate broker was entitled to a commission if the property sold within a term of one year, from April 15, 2003 to April 15, 2004. In addition, he was entitled to a commission if the property was sold within sixty days of the termination of the contract to someone with whom the owners had been negotiating during the contract term. At some point, the dates of the contract term were modified and initialed by both parties to reflect that the term was to last from April 15, 2003 to October 15, 2004. The parties dispute when this change took place and whether it accurately reflected their agreement. The property owners sold the property within sixty days of October 15, 2004, but refused to pay the real estate broker a commission. The real estate broker filed this action against the property owners to recover his commission and prejudgment interest. A jury returned a verdict in favor of the real estate broker and awarded him 3% prejudgment interest. The owners appealed regarding the sufficiency of the evidence, the trial judge's role as the thirteenth juror, the liability of one of the property owners, and prejudgment interest. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Charles D. Franken, Plantation, FL; T. Michael O'Mara, Cookeville, TN, for Appellants

Kenneth S. Williams, Cookeville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

In March of 2003, Nicholaos and Kathy Maggas bought commercial property at a foreclosure sale. The property was located in Cookeville, Tennessee, and it had previously been used as a restaurant.

Mr. Maggas subsequently contacted Greg Mabey, a licensed real estate broker d/b/a Liberty Realty & Auction, to discuss listing the property for sale or lease. On April 15, 2003, Mr. Maggas met with Mr. Mabey and executed a "Listing Contract" and "Addendum to Listing Contract – Lease Agreement." On the Listing Contract, Nick and Kathy Maggas were named as the owners of the property. The sale price was set at $750,000. The Listing Contract originally provided, in relevant part:

> In consideration of your listing and undertaking to find a purchaser for the real estate described below, I or we hereby grant and give you the exclusive right and authority to sell the same for period from 4-15 2003 to 4-15 2004 and agree that no other agreement is now in force with any other Realtor or Broker. If the property described below is sold while this listing is in force by myself or any other person, I or we agree to pay you a commission of 4% or, if it be sold within 60 days after cancellation or expiration to any person with whom you have negotiations, I or we agree to pay you a commission equal to 4% of the selling price.

The Addendum pertaining to the lease provided for a commission of $5500 for leasing the property, or the first month's rent, whichever was greater. It also provided, in part:

> Liberty Realty & Auction shall have an exclusive right to sell or lease the building located at 190 South Willow Ave. in Cookeville, TN for a period of 12 months from the date of signing this agreement.

However, when negotiating the contract, Mr. Maggas insisted on reducing the term of the agreement from one year to six months. Mr. Mabey agreed to the change, and they attempted to alter the documents to reflect their intention. The provision on the Addendum was modified and initialed to provide that Mr. Mabey had the exclusive right to sell or lease the property for six months. According to Mr. Mabey, the parties did not change the provision of the date on the Listing Contract, which continued to read "4-15 2003 to 4-15 2004," but both parties understood that their agreement was for six months. To the contrary, Mr. Maggas testified that the parties did change and initial the month that the agreement ended, but they forgot to change the year, so that the contract read "4-15 2003 to 10-15 2004." Mr. Maggas and Mr. Mabey both signed the documents. Mrs. Maggas was not present to sign, but Mr. Maggas told Mr. Mabey that he was "handling everything."

Mr. Mabey began showing and advertising the property shortly thereafter. Mr. Maggas was then contacted by a man whom he had bid against at the foreclosure sale named Rudy Alvarez. Mr. Alvarez owned several Mexican restaurants in the area and was interested in leasing or purchasing the property to open another restaurant. Mr. Maggas told Mr. Alavarez to contact Mr. Mabey.

Mr. Mabey and Mr. Alvarez discussed the property and Mr. Alavarez's concerns about the owner of a competing Mexican restaurant being interested in the property. Mr. Alavarez executed an offer to purchase the property on May 28, 2003, for $650,000. Mr. Mabey contacted Mr. Maggas about the offer, but Mr. Maggas rejected it. According to Mr. Mabey, Mr. Alavarez then decided to lease the property until he could save up enough money for a down payment in order to qualify for a larger loan from his bank.

On May 31, 2003, Mr. Mabey, Mr. Maggas, and Mr. Alvarez met in order to execute a lease. Mr. Maggas leased the property to Mr. Alvarez for a term of three years at $5000 per month. The lease provided options for Mr. Alavarez to extend the lease for up to fifteen more years. In addition, Mr. Alvarez was given an option to purchase the property "within a 12 month period" for $700,000, with a partial credit for any rent payments that he had made. The lease term was to begin on July 1, 2003, but no rent was to be paid until October 1, 2003, in order to allow Mr. Alvarez to improve the property in that time. The parties agreed that Mr. Mabey would receive the first month's rent as his commission regarding the lease. The lease was signed by Mr. Alvarez, his wife, and Mr. Maggas. Mr. Mabey notarized the lease.

According to Mr. Mabey, around that same time, he had a discussion with Mr. Maggas about the likelihood of Mr. Alvarez buying the property. Mr. Mabey felt that if Mr. Alvarez purchased the property within the option period, he should receive a commission on the sale. Mr. Mabey claims to have told Mr. Maggas that he would credit the $5000 lease commission he received against any sale commission that he was owed, to which Mr. Maggas replied, "don't worry I'll take care of you." Mr. Mabey claims that the parties then modified the Listing Contract to reflect their agreement. According to Mr. Mabey, the term of the agreement from "4-15 2003 to 4-15 2004" had never been changed, and he suggested that they simply change the "4"to a "10" to extend it until "10-15 2004." Mr. Mabey contends that the parties modified the provision accordingly and initialed the change. Mr. Maggas denies this subsequent agreement and claims that no changes were made to their Listing Contract after it was initially executed on April 15, 2003.

On or about September 22, 2004, Mr. Maggas and Mr. Mabey were discussing another property when Mr. Mabey asked if Mr. Alvarez planned to buy the restaurant. Mr. Mabey had noticed that Mr. Alvarez was extensively remodeling the restaurant, which would have violated the lease agreement. Mr. Maggas told him that Mr. Alvarez was not purchasing the restaurant.

On September 29, 2004, Mr. Maggas and Mr. Alvarez executed a document entitled "Offer to Purchase Real Estate." Mr. Alvarez made a deposit of $500 on the property and agreed to purchase the property for $725,000, contingent upon securing financing from his bank. Mr. Maggas conveyed the property to Mr. Alvarez by warranty deed on December 13, 2004.

Mr. Mabey called Mr. Maggas and Mr. Alvarez on numerous occasions to inquire about the status of the property, but his calls were never returned. He finally spoke with Mrs. Maggas, who told him that the building had been sold to Mr. Alvarez. When Mr. Mabey asked about his commission, she replied, "you didn't sell it, we sold it."

Mr. Mabey filed a complaint in the Circuit Court of Putnam County against Mr. and Mrs. Maggas on January 25, 2005. He alleged that, pursuant to the parties' contract, he had the exclusive right to sell the property from April 15, 2003, to October 15, 2004. He further alleged that the property was sold on December 13, 2004, within sixty days of the termination of their contract, entitling him to a commission on the sale. Mr. Mabey sought damages and prejudgment interest.

Mr. and Mrs. Maggas filed an answer in which they alleged that the parties only intended to have a six month contract term, from April 15, 2003 to October 15, 2003, despite the modification stating that it was from "4-15 2003 to 10-15 2004." They claimed that the year had not been changed due to inadvertence or mistake. They further denied that Mrs. Maggas ever signed the contract and denied that either party owed a commission to Mr. Mabey.

A jury trial was held on April 11, 2006, at which only Mr. Mabey and Mr. Maggas testified. The parties stipulated that if the jury found in favor of Mr. Mabey, his allowable commission on the sale would be 4% of $725,000, less $5000 as credit for the lease commission, totaling $24,000. Both parties testified that the contract originally provided for effective dates of "4-15 2003 to 4-15 2004." Both parties agreed that on the date of execution, they reduced the term of the agreement to six months and modified the Addendum accordingly. They also agree that, at some point, the term on the Listing Contract was modified, and that it now reads "4-15 2003 to 10-15 2004." Mr. Maggas claimed that it was modified on the day that it was executed, in an attempt to reduce the term to six months, but by mistake, they did not change the year. Mr. Mabey claimed that it was modified after Mr. Alvarez executed the lease, based upon their agreement that he was entitled to a commission if the property sold within the next year.

Mr. and Mrs. Maggas moved for a directed verdict at the close of Mr. Mabey's proof, and they renewed their motion after all the proof had been presented. The trial court denied both motions. The jury was instructed to determine whether the contract expired on October 15, 2003, or October 15, 2004. If it expired on October 15, 2003, then the property was not sold within sixty days of its termination, and Mr. Mabey was not entitled to a commission. If it expired on October 15, 2004, Mr. Mabey was entitled to a commission because the property was sold within sixty days. The jury was further instructed that if it found in favor of Mr. Mabey, it had discretion to award prejudgment interest at a rate that would represent the fair earning power of the money judgment, not to exceed ten percent.

The jury returned a verdict in favor of Mr. Mabey, and it awarded him prejudgment interest at the rate of 3%. The trial court's final order entered judgment in favor of Mr. Mabey for $24,000, plus $1035 in prejudgment interest and $684.25 in discretionary costs.

Mr. and Mrs. Maggas filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. They claimed that the jury's verdict was not supported by substantial and material evidence and was contrary to the weight of the evidence, relying upon the undisputed fact that the Addendum had always stated a term of six months. After a hearing, the trial court denied the motion. Mr. and Mrs. Maggas filed a timely notice of appeal.

II. ISSUES PRESENTED

The appellants present the following issues, which we reorder and restate slightly, for review:

1. Whether the trial court erred in not granting the defendants' motion for directed verdict at trial or their motion for judgment notwithstanding the verdict where the evidence adduced at trial indicated that the Listing Contract terms taken as a whole had expired prior to the sale of the real property.
2. Whether the trial court erred in not granting defendants' motion for directed verdict at trial or their motion for judgment notwithstanding the verdict where the competent evidence adduced at trial did not support the plaintiff's claim for liability and the trial judge failed to act as the thirteenth juror.
3. Whether the trial court erred in not granting defendants' motion for directed verdict at trial or their motion for judgment notwithstanding the verdict as to Mrs. Maggas when she was not a party to the contract.
4. Whether the trial court erred in not granting defendants' motion for directed verdict at trial or their motion for judgment notwithstanding the verdict as to prejudgment interest where there was no testimony to support the award of prejudgment interest.

For the following reasons, we affirm.

III. STANDARD OF REVIEW

This Court will set aside a jury's findings of fact only if there is no material evidence to support the verdict. Tenn. R. App. P. 13(d). "When addressing whether there is material evidence to support a verdict, an appellate court shall: (1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all [countervailing] evidence." ***Whaley v. Perkins***, 197 S.W.3d 665, 671 (Tenn. 2006) (citing *Crabtree Masonry Co., Inc. v. C & R Constr., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978); *Black v. Quinn*, 646 S.W.2d 437, 439-40 (Tenn. Ct. App. 1982)). Appellate courts do not reweigh the evidence, nor do we decide where the preponderance of the evidence lies. ***Crabtree***, 575 S.W.2d at 5. If there is any material evidence to support the verdict, it must be affirmed, or else the parties would be deprived of their constitutional right to a trial by jury. ***Id.*** "These principles apply as well in a breach of contract case tried by a jury as in a personal injury or other tort action." ***Id.*** Where a contract is such as to require the aid of parol evidence and the parol evidence is conflicting or may lead to more than one conclusion, the doubtful parts may be submitted to the fact-finder for resolution. ***Bratton v. Bratton***, 136 S.W.3d 595, 601-

602 (Tenn. 2004) (citing *Barker v. Freeland*, 91 Tenn. 112, 18 S.W. 60, 61 (1892); *Forde v. Fisk Univ.*, 661 S.W.2d 883, 886 (Tenn. Ct. App. 1983)).

The concept of materiality of the evidence does not relate to the weight of the evidence. ***Kelley v. Johns***, 96 S.W.3d 189, 194 (Tenn. Ct. App. 2002). "Rather, it involves the relationship between the proposition that the evidence is offered to prove and the issues in the case." ***Id.*** (citing *Knoxville Traction Co. v. Brown,* 115 Tenn. 323, 331, 89 S.W. 319, 321 (1905)). Evidence that is unrelated to a matter in issue is immaterial. ***Id.*** at 194-95. Thus, our task is "to determine whether the record contains any evidence relating to the matters in issue which, when reviewed in a light most favorable to the prevailing party, supports the jury's verdict." ***Id.*** at 195.

A challenge to the evidentiary foundation of the jury's verdict necessarily dictates the fate of a directed verdict claim. ***Kelley***, 96 S.W.3d at 194. "Directed verdicts cannot be granted unless the evidence permits reasonable minds to reach but one conclusion." ***Id.*** (citations omitted). If there is material evidence to support a jury's verdict, then by necessity, granting a directed verdict for the losing party would have been improper because the evidence permitted reasonable minds to reach more than one conclusion. ***Id.*** (citing *Alexander v. Armentrout,* 24 S.W.3d 267, 271 (Tenn. 2000)).

When the resolution of the issues in a case depends upon the truthfulness of witnesses, the fact-finder, who has the opportunity to observe the witnesses in their manner and demeanor while testifying, is in a far better position than this Court to decide those issues. ***Machinery Sales Co., Inc. v. Diamondcut Forestry Prods., LLC***, 102 S.W.3d 638, 643 (Tenn. Ct. App. 2002). The weight, faith, and credit to be given to a witness's testimony lies, in the first instance, with the trier of fact, and the credibility accorded will be given great weight by the appellate court. ***Id.***

We review a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness for the trial court's conclusions. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. DISCUSSION

A. Evidence Supporting the Jury Verdict

On appeal, Mr. and Mrs. Maggas assert that "the evidence adduced at trial indicated that the Listing Contract terms taken as a whole had expired prior [to] the sale of the real property." They claim that "by the weight of the evidence," the trial court erred by not directing a verdict in their favor.

Again, the Listing Contract clearly stated that Mr. Mabey had the exclusive right to sell the property from April 15, 2003 to October 15, 2004. The Addendum clearly stated that he had the exclusive right to sell or lease the property for only six months. It is undisputed that the parties altered the original term of the Listing Contract and initialed the change at some point. However,

the parties' testimony directly conflicted as to when the change was made and whether the change that was made accurately reflected their intentions or was a mistake.

Upon review of the evidence presented, we cannot say that it permits reasonable minds to reach but one conclusion as to the contract's date of termination. The jury returned a verdict in favor of Mr. Mabey, implicitly finding that the contract expired on October 15, 2004. This was the date of termination stated in the Listing Contract and initialed by both parties, and Mr. Mabey testified as to how and when the parties agreed on this date. On appeal, we are not at liberty to reweigh the evidence and decide where the preponderance lies, and we do not reevaluate the witnesses' credibility. Taking the strongest legitimate view of all the evidence in favor of the verdict, assuming its truth, and allowing all reasonable inferences to sustain the verdict, we find ample material evidence to support the jury's conclusion. Therefore, the trial court properly denied the appellants' motions for a directed verdict on this basis.

B. The Thirteenth Juror

Next, we address the appellants' argument that the trial judge failed to perform his duties as the thirteenth juror because the evidence presented at trial did not support Mr. Mabey's claim.

When a motion for new trial asserts that the jury's verdict was contrary to the weight of the evidence, it is the duty of the trial judge to weigh the evidence and determine whether it preponderates against the verdict, and if so, to grant a new trial. ***James E. Strates Shows, Inc. v. Jakobik***, 554 S.W.2d 613, 615 (Tenn. 1977) (citing *Vaulx v. Tenn. Central Railroad Company*, 120 Tenn. 316, 108 S.W. 1142 (1907)). The trial judge must be independently satisfied with the verdict rather than simply deferring to the jury's decision. ***Holden v. Rannick***, 682 S.W.2d 903, 906 (Tenn. 1984). The verdict is not valid until approved by the trial judge. ***Washington v. 822 Corp.***, 43 S.W.3d 491, 494 (Tenn. Ct. App. 2000). Appellate courts have likened the role the trial judge plays when reviewing the weight of the evidence to that of a "thirteenth juror." ***Whitaker v. Harmon***, 879 S.W.2d 865, 868 (Tenn. Ct. App. 1994).

"In performing his duty as thirteenth juror, the trial judge is not bound to give any reasons for his action, anymore than the jury is bound to do so." ***Jakobik***, 554 S.W.2d at 615. Where the trial judge simply approves the jury's verdict without comment, the appellate court must presume that the trial judge has weighed the evidence and adequately performed his function as the thirteenth juror. ***Holden***, 682 S.W.2d at 905; ***Gordon's Transports, Inc. v. Bailey***, 41 Tenn. App. 365, 381, 294 S.W.2d 313, 321 (Tenn. Ct. App. 1956). In other words, the appellant must make an affirmative showing that the trial judge failed to weigh the evidence and exercise his function as the thirteenth juror. ***Gordon's Transports***, 41 Tenn. App. at 381, 294 S.W.2d at 321.

This showing can be made by pointing to any statements or reasons that were given by the trial judge in denying the motion for new trial, but "this court looks to them only for the purpose of determining whether he passed upon the issues, and was satisfied or dissatisfied with the verdict thereon." ***Holden***, 682 S.W.2d at 905 (quoting *Cumberland Telephone & Telegraph Co. v.*

Smithwick, 112 Tenn. 463, 470, 79 S.W. 803, 805 (1904)). We do not reweigh the evidence or review the comments to see if we agree with the court's reasoning, but we do look to see if the trial judge reviewed the evidence and was satisfied or dissatisfied with the verdict. ***Heath v. Memphis Radiological Prof'l Corp.***, 79 S.W.3d 550, 554 (Tenn. Ct. App. 2001). If it appears from any reasons assigned or statements made in passing on a motion for a new trial that the trial judge was not actually satisfied with the verdict, it is the duty of the appellate courts to grant a new trial, the material evidence rule notwithstanding. ***Jakobik***, 554 S.W.2d at 615; ***Shivers v. Ramsey***, 937 S.W.2d 945, 947 (Tenn. Ct. App. 1996). *See, e.g.*, ***Holden***, 682 S.W.2d at 905 ("I would just as readily have agreed with the verdict the other way"); ***Miller v. Doe***, 873 S.W.2d 346, 348 (Tenn. Ct. App. 1993) ("I'm not inclined to interfere with the verdict of the jury"); ***Sherlin v. Roberson***, 551 S.W.2d 700 (Tenn. Ct. App. 1976) ("I can't say the jury reached the wrong verdict. I can't say that they reached the right verdict.").

In this case, the trial judge's order denying the appellants' post-trial motion simply states:

> The parties having come before the court on the defendants' Motion for for [sic] judgment notwithstanding the verdict and/or for a New Trial, and after arguments of counsel and for good cause shown, the defendants['] Motion is hereby denied in its entirety and the Order of Final Judgment stands as entered.

We have no transcript of any hearing that took place to address the motion. As support for their argument that the trial judge failed to act as the thirteenth juror, Mr. and Mrs. Maggas point to two statements made by the trial judge in response to their motions for a directed verdict. In denying their first motion, the judge stated, "I believe there's a continuing issue of material fact for the jury to decide, and I overrule your motion at this time." When the appellants renewed their motion at the close of all the proof, the judge stated, "I think it is a jury question." We do not construe these statements as suggesting that the trial judge misconceived his duty to act as a thirteenth juror, such that he would have approved of a jury verdict reaching either conclusion. Instead, the judge merely recognized that there was ample evidence for the case to go to the jury because reasonable minds could differ as to the conclusion to be reached.[1]

Also, Mr. and Mrs. Maggas claim that the trial judge was required "to make a finding on the record from the evidence, that the evidence supports the verdict." They further argue that the trial

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[1] In ***Shivers***, 937 S.W.2d at 947, the Eastern Section of this Court was faced with a similar argument because a trial judge had stated, "I think this is precisely a case for this jury to decide," before he stated that the evidence did not preponderate against the verdict. The Court of Appeals rejected the suggestion that the comment demonstrated that the trial judge would have deferred to any verdict that was reached. ***Id.*** Rather, the Court interpreted the statements as recognizing that there was evidence from which a jury could have resolved the case in favor of either side, which simply meant that the case was properly submitted to the jury. ***Id.*** This was not to say that the trial judge would have resolved the issue of the preponderance of the evidence differently had the jury found in favor of the other party. ***Id.*** *See also* ***Heath***, 79 S.W.3d at 554 (judge's remark as to the existence of material evidence to support either verdict was not equivalent to a finding that the weight of the evidence actually favored the losing party).

court "abrogated its obligation to weigh the evidence and credibility independently" because it made no express findings and denied their motion for a new trial without stating any basis for doing so. We disagree. "Where a trial judge has simply approved the verdict without comment an appellate court will presume that he has adequately performed his function as thirteenth juror." ***Jones v. Tenn. Farmers Mut. Ins. Co.***, 896 S.W.2d 553, 557 (Tenn. Ct. App. 1994) (citing *Holden v. Rannick*, 682 S.W.2d 903, 905 (Tenn. 1984)). In overruling a motion for new trial challenging the weight of the evidence, a trial judge necessarily weighs the evidence and performs his duties as thirteenth juror. ***Kear v. Birdwell***, No. 03A01-9301-CV-00089, 1993 WL 262910, at *2 (Tenn. Ct. App. E.S. July 13, 1993). "We conclusively presume that in overruling the motion without comment the trial judge fully and properly preformed his function and was satisfied with the verdict." ***Id.*** If there is no evidence to overcome the presumption, the trial judge's actions must be affirmed. ***Jones***, 896 S.W.2d at 557.

We have previously rejected arguments similar to the one presented by Mr. and Mrs. Maggas. For example, in ***Jones***, 896 S.W.2d at 556-57, the appellant had filed a motion for new trial alleging that the verdict was contrary to the weight of the evidence. The trial judge entered an order denying the motion without comment, simply stating that the motion was not well taken. ***Id.*** On appeal, we affirmed, rejecting the notion that trial judges "must at least indicate" that they have weighed the evidence when acting as thirteenth juror. ***Id.*** Also, in ***Whitaker***, 879 S.W.2d at 868, we affirmed a trial court acting as a thirteenth juror when the judge only stated that the motion for new trial was not well taken. We again emphasized that trial judges are not required to explain or give reasons for denying the motion for new trial. ***Id.*** Again, in ***Taylor v. Jones***, Greene Law No. 148, 1991 WL 69040, at *3 (Tenn. Ct. App. W.S. Apr. 30, 1991), we found that the trial judge properly performed his duties as the thirteenth juror even though he never made an express statement that the preponderance of the evidence supported the verdict.

In sum, the record before us contains no indication that the trial judge did not properly perform the function of thirteenth juror. Because the trial judge denied the motion for new trial without comment, we must presume that he independently weighed the evidence and approved the verdict. The judge was not required to make any particular statement about the weight of the evidence or his reasons for denying the motion. In addition, the judge's comments in response to the motions for directed verdict merely recognized that the evidence supported different conclusions and the case should be submitted to the jury. This is not to say that he would have approved a verdict for either party or that he simply deferred to the jury's decision.

Because we find no error in the trial court's actions as thirteenth juror, our review of the appellants' argument regarding the sufficiency of the evidence is subject to the well-established "material evidence" standard discussed earlier. *See* ***In re Estate of Brindley***, No. M1999-02224-COA-R3-CV, 2002 WL 1827578, at *23 (Tenn. Ct. App. Aug. 7, 2002) (citing *Woods v. Walldorf & Co., Inc.*, 26 S.W.3d 868, 874 (Tenn. Ct. App. 1999)). We have already determined that there is material evidence to support the jury's verdict.

C. Mrs. Maggas

On appeal, the appellants assert that the trial court erred in not granting a directed verdict or the motion for judgment notwithstanding the verdict as to Mrs. Maggas because she was not a party to the Listing Contract. Basically, they now claim that Mrs. Maggas should not be held to the agreement because she never signed it.

We find nothing in the record to indicate that this argument was raised in the trial court. The answer filed on behalf of Mr. and Mrs. Maggas denied that she signed or was a party to the documents, but they never presented an affirmative defense or otherwise sought any relief on this basis. The appellants only generally moved for directed verdicts "based on the proof," without mentioning any argument about Mrs. Maggas not signing the contract. The appellants' motion for judgment notwithstanding the verdict alleged that the jury verdict was not supported by the evidence because of the six month term stated in the Addendum, but it did not refer to Mrs. Maggas individually and the fact that she did not sign the contract. Apparently, they argue that the trial court should have dismissed the claim against Mrs. Maggas voluntarily or *sua sponte* based upon the fact that her signature was not on the Listing Contract. We disagree with this assertion because we find that the evidence presented necessarily leads to the conclusion that even though she did not personally sign the Listing Contract, Mr. Maggas was expressly authorized to act on her behalf in executing it.

Unless prevented by public policy, a statute, or a contract requiring personal performance, what a person can lawfully do himself, he can do through an agent. ***Mays v. Brighton Bank***, 832 S.W.2d 347, 351 (Tenn. Ct. App. 1992). An "agent" is simply one who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter. ***Electric Power Bd. of Metro. Gov't of Nashville and Davidson County v. Woods***, 558 S.W.2d 821, 824 (Tenn. 1977); ***General Constr. Contractors Ass'n, Inc. v. Greater St. Thomas Baptist Church***, 107 S.W.3d 513, 522 (Tenn. Ct. App. 2002). This delegation may be manifested by an express authorization, or it may be implied from the circumstances and the conduct of the parties. ***Mays***, 832 S.W.2d at 351 (citing 1 *Tenn. Jurisprudence*, Agency, § 6, p. 353-54 (1982)). An agreement, contract, or understanding between the parties that their acts are those of "principal and agent" is not necessary for an agency to exist. ***Woods***, 558 S.W.2d at 824. "Under modern rules, there is no doubt that a married person may be authorized to act for the other spouse," but authority in this connection will not be implied solely from the marital relation. ***Goode v. Daughtery***, 694 S.W.2d 314, 317 (Tenn. Ct. App. 1985) (citing 41 Am. Jur. 2d *Husband and Wife* § 241 (1968)). The agency relationship in such a case rests on the same considerations as any other agency. ***Id.*** The existence of an agency relationship is a question of fact under the circumstances of a particular case, based upon an examination of the parties' actual relationships, agreements, or conduct. ***Bostic v. Dalton***, 158 S.W.3d 347, 351 (Tenn. 2005); ***Woods***, 558 S.W.2d at 824.

At trial, Mr. Maggas testified that he did in fact have authority from Mrs. Maggas to negotiate the Listing Contract. On the Listing Contract, he listed the owners of the property as "Nick + Kathy Maggas," and Kathy's cell phone number was listed for contact information. In the space for the owners' signatures, only Mr. Maggas signed his name. At trial, Mr. Mabey testified that he asked

about Mrs. Maggas signing the documents and Mr. Maggas told him that he was "handling everything." Mr. Mabey informed Mr. Maggas that Mrs. Maggas would need to sign the deed if they ultimately found a purchaser. Mrs. Maggas did not testify at trial, and she presented no evidence to suggest that Mr. Maggas was not authorized to enter into the contract on her behalf.

Testimony of an alleged agent is competent to prove agency. ***Kerney v. Aetna Cas. & Sur. Co.***, 648 S.W.2d 247, 253 (Tenn. Ct. App. 1982). "Where the testimony of a witness is not contradicted, either by direct evidence or by circumstances inconsistent with its truth, it must be taken as true." ***Ray Carter, Inc. v. Edwards***, 222 Tenn. 465, 469-470, 436 S.W.2d 864, 866 (Tenn. 1969) (citing *Bank of Hendersonville v. Dozier*, 24 Tenn. App. 178, 142 S.W.2d 191 (1940); *Frank v. Wright*, 140 Tenn. 535, 205 S.W. 434 (1917)). Here, the testimony of Mr. Mabey and Mr. Maggas was not contradicted or impeached, and the circumstances are not inconsistent with their testimony that Mr. Maggas had express authority from Mrs. Maggas to enter into the transactions for both their benefit. Mr. Maggas executed the Listing Contract naming himself and his wife as the owners, and he signed the lease and the options to purchase without objection from Mrs. Maggas. Mrs. Maggas signed the deed when it was ultimately executed after Mr. Maggas signed the offer to purchase. Although the question of agency is ordinarily one of fact that must be submitted to the jury where evidence is conflicting, it is not necessary when reasonable minds could only reach one conclusion from the evidence with respect to the existence of agency. ***Meadows v. Patterson***, 21 Tenn. App. 283, 109 S.W.2d 417, 420 (Tenn. Ct. App. 1937).

Mrs. Maggas never sought any relief in the trial court on the basis that she did not sign the contract or that Mr. Maggas was not authorized to act on her behalf. Furthermore, she never presented any evidence to support such an argument, and we find that she is not entitled to such relief on appeal. The evidence supports the trial court's implicit finding that Mrs. Maggas was bound by the contract executed on her behalf by Mr. Maggas.

D. Prejudgment Interest

Finally, Mr. and Mrs. Maggas assert that the trial court erred when it allowed the jury to award prejudgment interest because "there was no testimony to support the award of prejudgment interest." They claim that "the test is for the Plaintiff to show the loss of use of money and that Plaintiff was not otherwise compensated," and they argue that Mr. Mabey was required to present "evidence of the fair earning power of money at trial." We find no support for this argument in the cases cited by Mr. and Mrs. Maggas.

"Tennessee's courts have always had the power to award prejudgment interest as an element of damages." ***Scholz v. S.B. Int'l, Inc.***, 40 S.W.3d 78, 81 (Tenn. Ct. App. 2000). The common law power to award prejudgment interest has consistently been viewed as an equitable matter entrusted to the trial judge's discretion. ***Id.*** The modern statute addressing prejudgment interest provides that "[p]rejudgment interest . . . may be awarded by courts or juries in accordance with the principles of

equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum[.]"[2] Tenn. Code Ann. § 47-14-123 (2001). This statute has been construed to preserve the discretionary character of the decision to award prejudgment interest. ***Id.*** "An award of prejudgment interest is within the sound discretion of the trial court and the decision will not be disturbed by an appellate court unless the record reveals a manifest and palpable abuse of discretion." ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998) (citing *Spencer v. A-1 Crane Service, Inc.*, 880 S.W.2d 938, 944 (Tenn. 1994); *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992)). The trial court's discretion "extends not only to awarding of prejudgment interest but also to the amount of interest allowed and the time over which it shall be calculated." ***AHCI, Inc. v. Lamar Adver. of Tenn., Inc.***, No. 03A01-9301-CH-00010, 1994 WL 25848, at *4 (Tenn. Ct. App. E.S. Jan. 26, 1994), *aff'd*, 898 S.W.2d 191 (Tenn. 1995).

Prejudgment interest awards are based on the recognition that a party is damaged by being forced to forego the use of his money from the time that they should have received it until the date of judgment. ***Scholz***, 40 S.W.3d at 82. The plain language of Tenn. Code Ann. § 47-14-123 provides for the award to be based upon equitable principles, but it limits equitable awards to 10% per annum per year. ***Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 447 (Tenn. 1992). The award must be fair, given the particular circumstances of the case. ***Myint***, 970 S.W.2d at 927. For example, on appeal, a Court may modify or reduce the award of prejudgment interest if we deem it "excessive given the equities of the case." *See* ***Estate of Fetterman ex rel. Fetterman v. King***, 206 S.W.3d 436, 447 (Tenn. Ct. App. 2006). Courts must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he was legally entitled, and not to penalize a defendant for wrongdoing. ***Id.*** Some examples of equitable considerations that may support an award of prejudgment interest include: if the amount the plaintiff was owed was easily ascertainable; if the plaintiff did not unreasonably delay filing suit; if the plaintiff did not inappropriately delay the proceedings once suit was filed; if the defendant had full use of the money during the time that it should have been available to the plaintiff; and if the plaintiff has not otherwise been compensated for the loss of use of the funds. ***Scholz***, 40 S.W.3d at 84.

In sum, the judge or jury is empowered to award prejudgment interest in accordance with equitable principles at any rate not to exceed 10% per annum per year. In the case at bar, the trial judge instructed the jury that an award of prejudgment interest was within its discretion if it found in favor of Mr. Mabey by a preponderance of the evidence. The judge also explained that "[t]he rate of prejudgment interest would equal the fair earning power of the money judgment, if any, from the time of the breach until the date of verdict and may not exceed ten percent by state law." The jury exercised its discretion to award prejudgment interest to Mr. Mabey at the rate of 3%. We find no authority for the proposition that a plaintiff must present testimony or other proof demonstrating what he considers to be a "reasonable rate." "The legislature makes it clear [in § 47-14-123] that the *rate* of prejudgment interest is to be determined by the finder of fact *in accordance with the*

[2] Mr. and Mrs. Maggas do not contend that the rate awarded was excessive under Tenn. Code Ann. § 47-14-123 or the related provisions of § 47-14-103.

principles of equity at a rate of up to 10% per annum." ***Dunham v. Fortner Furniture Co.***, Shelby Law No. 99, 1987 WL 6372, at *10 (Tenn. Ct. App. W.S. Feb. 13, 1987) (emphasis added).

In ***Mitchell v. Mitchell***, 876 S.W.2d 830, 832 (Tenn. 1994), a defendant challenged a trial court's award of prejudgment interest because the plaintiff failed to plead prejudgment interest as special damages in her petition. The plaintiff's only request for prejudgment interest came during her attorney's closing arguments at the conclusion of the case. *See* ***Mitchell v. Mitchell***, No. 01-A-01-9206-CV00244, 1993 WL 33765, at *9 (Tenn. Ct. App. M.S. Feb. 10, 1993). Nevertheless, the Tennessee Supreme Court held that the trial court could award prejudgment interest in accordance with principles of equity even though the plaintiff did not seek interest in her prayer for relief. ***Mitchell***, 876 S.W.2d at 832. Likewise, in the case before us, we find that the jury could, in its discretion, look to equitable considerations relevant to the case in order to determine an amount that would fairly compensate Mr. Mabey for the lost use of the money judgment. We find no abuse of discretion in its decision to award prejudgment interest in this case or in the award of interest at 3%. This final issue is without merit.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the circuit court. Costs of this appeal are taxed to the appellants, Nicholaos and Kathy Maggas, and their surety, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE